

Letter of Findings: 03-20110355
Withholding Tax - Late Payment Penalty
For the Tax Period January 2011

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ISSUE

I. Withholding Tax – Late Payment Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer seeks abatement of the penalty for late payment of withholding tax for January 2011.

STATEMENT OF FACTS

Taxpayer filed its January 2011 withholding return and payment late. Taxpayer was assessed a late payment penalty. Taxpayer protests the penalty and requests abatement. A hearing was held on Taxpayer's protest and this final determination ensues. Additional facts will be provided as needed.

I. Withholding Tax – Late Payment Penalty.

DISCUSSION

Taxpayer does not dispute the fact that it was late with its payment of January 2011 withholding tax. Taxpayer, however, requests that the late payment be abated for reasonable cause.

IC § 6-8.1-10-2.1 states in relevant part:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10[percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

(d) If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

(e) A person who wishes to avoid the penalty imposed under this section must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust, in a written statement containing a declaration that the statement is made under penalty of perjury. The statement must be filed with the return or payment within the time prescribed for protesting departmental assessments. A taxpayer may also avoid the penalty imposed under this section by obtaining a ruling from the department before the end of a particular tax period on the amount of tax due for that tax period.

(f) The department shall adopt rules under [IC 4-22-2](#) to prescribe the circumstances that constitute reasonable cause and negligence for purposes of this section.

Under IC § 6-8.1-5-1(b), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care,

caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id. IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Taxpayer demonstrated that it acted with reasonable cause under circumstances involving the firing of its CFO on a Friday afternoon and the hiring of a new CFO the following Monday. Taxpayer demonstrated that the new CFO acted quickly to attend to Taxpayer's tax filing duties but was delayed briefly due to the requirement to file a "Change of Responsible Officer Form" with the Department before completing its withholding filing and payment obligations.

Taxpayer presented additional documentation in support of its protest and has established that it "exercised ordinary business care and prudence" during a difficult transition. Taxpayer has shown that its late payment was due to reasonable cause and not willful neglect and therefore, the penalty shall be waived.

FINDING

Taxpayer's protest is sustained.

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